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**UNITED STATES DISTRICT COURT**

**SOUTHERN DISTRICT OF CALIFORNIA**

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| B.I.P. CORPORATION,<br><br>Plaintiff,<br><br>vs.<br><br>MITEC TELECOM, INC., AND DOES 1 TO 30,<br><br>Defendant. | Case No. 08 CV 0313 H (CAB)<br><br>**DEFENDANT MITEC TELECOM, INC.'S MOTION TO DISMISS UNDER RULE 12(b)(6), AND IN THE ALTERNATIVE FOR SUMMARY JUDGMENT UNDER RULE 56**<br><br>Date: October 20, 2008<br>Time: 10:30 a.m.<br>Place: Courtroom 13<br><br>Complaint Filed: January 18, 2008<br>Trial Date: None Set |

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# I. INTRODUCTION

On April 18, 2008, more than two months before Plaintiff filed its Second Amended Complaint in this action on June 20, 2008, judgment was entered in favor of Mitec and against Plaintiff in the case of *Mitec Telecom, Inc. v. BIP Corporation and Export Development Canada*, Quebec Superior Court, District of Montreal Case No. 500-17-040674-080 (the "Quebec Action"). In that action, Mitec brought suit under the Bill and Hold Agreement entered into between Mitec and Plaintiff on July 25, 2006, contending that Mitec had supplied inventory to Plaintiff for which Plaintiff had not paid, and seeking recovery of Can$498,348.39 in payment for that inventory. After being served with process in the Quebec Action, Plaintiff failed to appear in the action or file any response; accordingly, the Quebec court entered a default judgment against Plaintiff (the "Quebec Judgment").

The Quebec Judgment has conclusive res judicata effect in this case. Accordingly, this action therefore should be dismissed pursuant to Rule 12(b)(6), or, in the alternative, summary judgment should be granted to Mitec pursuant to Rule 56. While courts in the United States are not obligated to give effect to judgments of a foreign court in the same way that they give effect to judgments of other state and federal courts under the Full Faith and Credit Clause of the U.S. Constitution, courts in this country nevertheless have appropriate respect for those judgments and will give them res judicata effect if they have that effect in the country of rendition and meet the American standard of a fair trial before a court of competent jurisdiction. As detailed below, the Quebec Judgment meets these standards. Indeed, the California courts, whose law applies in determining res judicata issues in this diversity action, have long given respect and effect to judgments of the Canadian courts. And there can be no doubt that the Quebec Action encompasses the issues raised in the present action. Plaintiffs' claims for misappropriation of trade secrets; fraud and deceit; interference with prospective economic advantage; breach of the implied covenant of good faith and fair dealing; and breach of contract all are inextricably intertwined with Mitec's claim for, and judgment for, money against Plaintiff. Plaintiff cannot, at this juncture, maintain the present action when another court of competent jurisdiction has found and adjudged that Plaintiff owes Mitec for the same inventory at issue in the present action rather than the other way around. Plaintiff had the opportunity to appear and contest the Quebec Action, but chose not to. It should not be permitted to get a second, unfair and unwarranted bite at the apple now. Accordingly, as explained in greater detail below, Plaintiff's Second Amended Complaint should be dismissed, or, in the alternative, summary judgment should be granted in Mitec's favor.

## II. FACTUAL BACKGROUND

On January 16, 2008, Mitec filed the Quebec Action in the Superior Court in Montreal. (Request for Judicial Notice, Exh. A; Declaration of Bruno Dumais ("Dumais Decl."), ¶ 6 and Exh. E thereto.) In that action, Mitec sought recovery for telecommunications equipment ordered by and delivered to Plaintiff, but for which it had not been paid. Specifically, Mitec alleged that it had entered into a Bill and Hold Agreement (the "Agreement") with Plaintiff whereby it would sell telecommunications equipment to Plaintiff, which equipment would then be sold by Plaintiff to its customers. In this connection, Mitec alleged that it fulfilled all of its obligations under the Bill and Hold Agreement except to the extent that those obligations were excused by Plaintiff's breach. Mitec alleged that Plaintiff had breached the Bill and Hold Agreement by failing to pay to Mitec US$488,050.52 for inventory and materials shipped by Mitec to Plaintiff between May 30, 2006, and July 27, 2007. (Id.)

Mitec filed the Quebec Action pursuant to Section 111 of the Quebec Code of Civil Procedure,[1] and paragraph 8.7 of the Agreement, which provides that the

[1] True and correct copies of the referenced sections of the Quebec Code of Civil Procedure marked as Exhibit 1 are attached hereto for the Court's convenience.

Agreement is to be construed according to the laws of Quebec and Canada, and whereby Mitec and BIP submitted to the non-exclusive jurisdiction of the judicial district of Montreal for actions arising under or relating to the Agreement. (Dumais Decl., ¶¶ 2, 6 and Exh. A thereto.)

Prior to filing the Quebec Action, Mitec's counsel prepared a demand letter, dated November 15, 2007, for service upon BIP, demanding payment of US$448,050.52. Service of that demand letter on BIP was hampered by BIP's deliberate evasion of service at its facility in San Marcos, San Diego County, California. (Request for Judicial Notice, Exh. C and Exh. P-4 thereto; Dumais Decl., ¶ 5 and Exhs. C and D thereto.) As a consequence of this difficulty in effecting service of the demand letter, Mitec sought from the Quebec court an order, pursuant to Quebec Code of Civil Procedure Section 138, permitting Mitec to serve the Quebec Action by facsimile. That Motion was granted on January 18, 2008. (Request for Judicial Notice, Exh. B; Dumais Decl., ¶ 7 and Exh. F thereto; a certified translation of Exhibit F is filed and served concurrently herewith.) Pursuant to the permission granted by the court, the Quebec Action was served on BIP by facsimile on January 18, 2008. (Request for Judicial Notice, Exh. B; Dumais Decl., ¶ 8 and Exh. G thereto; a certified translation of Exhibit G is filed and served concurrently herewith.)

Pursuant to Quebec Code of Civil Procedure Section 119, the Quebec Action provided that a response from Plaintiff was to be filed within 10 days of service. Plaintiff has never filed any response to the Quebec Action. (Request for Judicial Notice, Exh. A, Schedule 1; Dumais Decl., ¶ 9 and Exh. E thereto, Schedule 1.) As a consequence, Mitec filed, in the Quebec Action, an Affidavit for Judgment, dated February 27, 2008, seeking rendering of judgment for Mitec and against BIP. (Request for Judicial Notice, Exh. C; Dumais Decl., ¶ 9 and Exh. H thereto.) Thereafter, on April 18, 2008, the Superior Court in Montreal entered the Quebec Judgment, awarding to

Mitec Can$498,348.39 (based on the exchange rate between the U.S. and Canadian dollars). (Request for Judicial Notice, Exh. D; Dumais Decl., ¶ 10 and Exh. I thereto.)

Without even bothering to take note of the proceedings in the Quebec Action, Plaintiff filed its Second Amended Complaint in this action on June 20, 2008, more than two months after the Quebec Judgment was entered. And that Second Amended Complaint deals with the same commercial relationship that was the basis for the Quebec Action. Specifically, Plaintiff alleges that on or about June 2, 2005, representatives of Plaintiff and Mitec met and executed a non-disclosure agreement which prohibited the disclosure by Mitec of "confidential information," including customer information, except "to carry out discussions concerning, and the undertaking of, the relationship." (Second Amended Compl., ¶¶ 6-13.) Plaintiff then contends that more than one year later, on or about July 25, 2006, Plaintiff and Mitec entered into a written "bill and hold agreement" dealing with prospective sales of product by Mitec to Plaintiff, which provided that Mitec would be responsible for any defects in that product. (Second Amended Compl., ¶¶ 14-16.) Plaintiff also alleges that subsequently, on October 24, 2006, the parties met "and negotiated for an increase in the sale of telecommunications product. ..." (Second Amended Compl., ¶ 17.) Plaintiff then alleges that in 2007, Plaintiff "entered into several purchase agreements by issuing purchase orders to Mitec totaling approximately $3.5 million dollars." (Second Amended Compl., ¶ 18.) According to Plaintiff, in December 2006 and January 2007 Mitec shipped defective equipment to Plaintiff that Mitec's sales vice-president allegedly admitted were defective, but that ultimately were deemed by Mitec to be in working condition. (Second Amended Compl., ¶¶ 19-26.)

Plaintiff then contends that, as part of its commercial relationship with Mitec, it required its employees and Mitec to keep confidential a customer list identifying those customers that regularly purchased telecommunications equipment from Plaintiff.

(Second Amended Compl., ¶¶ 27-29.) Plaintiff alleges that in spite of these purported confidentiality agreements and efforts to keep its customer list confidential, Mitec, beginning in May 2007, used the list to solicit purchase orders from Plaintiff's customers, and continued doing so despite Plaintiff's demands that the solicitations cease. (Second Amended Compl., ¶¶ 30-37.) Based on the foregoing, Plaintiff alleges causes of action for (1) misappropriation of trade secrets; (2) fraud and deceit; (3) intentional interference with prospective economic advantage; (4) breach of the covenant of good faith and fair dealing; and (5) breach of contract.

While Plaintiffs' Second Amended Complaint contains more causes of action than the pleading in the Quebec Action, Plaintiff cannot claim that it encompasses greater facts and issues than the Quebec Action did. Instead, it is plain that both actions deal with the same nucleus of operative facts: the commercial relationship between Mitec and Plaintiff and their mutual obligations as part of that relationship. Plaintiff chose to ignore the Quebec Action and instead pursued the present lawsuit. Plaintiff made that choice at its peril. The Quebec Judgment dealt with the respective obligations of the parties, and as a consequence Plaintiff's Second Amended Complaint should be dismissed, or summary judgment should be granted, on the grounds of res judicata.

## III. MEMORANDUM OF POINTS AND AUTHORITIES

### A. Standards For Motion To Dismiss And For Alternative Motion For Summary Judgment (FRCP 12(b)(6), 12(d), 56)

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismissal is appropriate where "it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief." *Rutman Wine Co. v. E & J Gallo Winery*, 829 F.2d 729, 732 (9th Cir. 1987). The manner and details of pleading in the federal court are governed by the Federal Rules of Civil Procedure regardless of the substantive law to be applied in a particular action. *See* F.R.C.P. 1; *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965) (the Federal Rules govern issues concerning the adequacy of the pleadings). And under those rules, a motion to dismiss under Rule 12(b)(6) is an appropriate vehicle to seek dismissal of an action based on res judicata grounds. *See Holcombe v. Hosmer*, 477 F.3d 1094, 1096 (9th Cir. 2007) (Rule 12(b)(6) motion brought to dismiss 42 U.S.C. § 1983 claim when termination claim had previously been litigated in Nevada state court action).

Rule 12(d) of the Federal Rules of Civil Procedure provides that in cases where evidence in addition to what appears on the face of the pleadings is brought before the Court, it must treat the motion as one for summary judgment under Rule 56. In such circumstances, where it is appropriate for the moving party to include evidence beyond the face of the pleading, it is likewise appropriate for the moving party to file and notice the motion as being a motion to dismiss pursuant to Rule 12(b)(6) and, in the alternative, for summary judgment under Rule 56. (*See* The Rutter Group, California Practice Guide: Federal Civil Procedure Before Trial (2008), Attacking the Pleadings, §§ 9:233-9:239, at pp. 9-76-9-80.) When presented with such a motion, the Court converts the motion to dismiss to a motion for summary judgment if the Court actually relies on the extraneous materials in ruling on the motion. *Kearns v. Tempe Technical Institute, Inc.,* 110 F.3d 44, 46 (9th Cir. 1997).

Here, Mitec presents the documents from the Quebec Action, including the Quebec Judgment, as documents that should be judicially recognized; on that basis, Mitec contends that this Court may decide this Motion based on the pleadings and those documents without converting the motion to one for summary judgment. However, should this Court determine that the documents may not be judicially recognized, then the same documents, attached to the Declaration of Bruno Dumais, may be used as the basis for a ruling on the motion as one for summary judgment.

**B. The California Courts Would Recognize the Quebec Judgment.**

In diversity actions, California substantive law is applied to determine the validity of the plaintiff's claims. *See Erie R.R. Co. v. Thompkins*, 304 U.S. 64, 58 S.Ct. 817, 82. L.Ed. 1188 (1938). This rule applies to the issue of whether a prior court judgment precludes relitigation of claims or defenses in a later federal diversity action. *See Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 375 (1996) (whether prior state court judgment has preclusive effect in diversity action determined by state law); *Bank of Montreal v. Kough,* 430 F.Supp. 1243, 1246 (N.D. Cal. 1977). And California law accords great respect to the judgments of foreign courts: indeed, "a foreign judgment will be res judicata" in a California court "if it has that effect in the country of rendition, and it if meets the American standard of fair trial before a court of competent jurisdiction." *Beroiz v. Wahl,* 84 Cal.App.4th 485, 494 (2000) (quoting 7 Witkin, California Procedure (4th ed. 1997), Judgments, § 299, at p. 846.)[2]

In determining whether the Quebec Judgment meets these standards, cases decided under the Uniform Foreign Money-Judgments Recognition Act (California Code of Civil Procedure § 1713 et seq.) are instructive. *See* 7 Witkin, California Procedure (4th ed. 1997), Judgments, § 299, at p. 846. Section 1716 sets forth the standards for recognition of a foreign-country judgment. It provides that the California courts shall recognize those judgments unless specific exceptions apply. The courts shall not recognize a foreign judgment if "[t]he judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law;" "[t]he foreign court did not have personal jurisdiction over the defendant;" or "[t]he foreign court did not have jurisdiction over the subject matter." Code of Civil Procedure § 1716(b)(1)-(3). And the courts are not required to recognize foreign court judgments if, among other things, the defendant did

[2] Copies of the California state court cases cited herein are attached hereto as Exhibit 2 for the Court's convenience.

not have adequate notice to defend the proceeding; the judgment was obtained by fraud; the judgment is somehow repugnant to public policy; the foreign court was a "seriously inconvenient" forum; the circumstances of the judgment raise "substantial doubt about the integrity of the rendering court with respect to the judgment;" or the proceedings of the foreign court were not compatible with due process. Code of Civil Procedure § 1716(c)(1), (2), (3), (6), (7) (8).

The Quebec Judgment is free from any of these disabling characteristics. As detailed above, there can be no doubt that the Quebec Action was between the same parties as are present in the instant action, and that the procedures of the Quebec court were impartial and comported with due process. The California courts have long accorded great respect and deference to the judgments of Canadian courts. *See Clarkson v. Moir,* 53 Cal.App. 775, 778 (1921) (judgment of Supreme Court of Ontario binding and enforceable in California). And Plaintiff will be utterly unable to point to any defect in the Quebec court's procedures that gives rise to any doubt about its integrity and circumspection. This will be the case most especially because Plaintiff agreed that actions under the Agreement would be governed by Quebec and Canadian law, and that the Quebec Court would have non-exclusive jurisdiction over such proceedings. (Dumais Decl., ¶¶ 2, 7 and Exh. A thereto.) Accordingly, Plaintiff cannot point to any defects in jurisdiction in the Quebec Action.

Under these circumstances, this Court should accord to the Quebec court and to the Quebec Judgment full recognition. The courts of California have long recognized that the Canadian courts, their procedures and their judgments, are due the highest respect, and the judgment at issue here should be regarded no differently.

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**C. Under Canadian Law, The Quebec Judgment Has Res Judicata Effect.**

To determine whether the Quebec Judgment has res judicata effect, it must be established that the judgment would have such an effect under Canadian law. *Beroiz v. Wahl, supra,* 84 Cal.App.4th at 494 (for foreign judgment to have res judicata effect, it must have such "effect in the country of rendition"); *Estate of Cleland,* 119 Cal.App.2d 18, 20 (1953).[3]

In *Bank of Montreal v. Kough, supra,* the court sets forth in detail the substance of Canadian law with respect to the res judicata effect of judgments. Specifically, the court noted that "[t]he plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." 430 F.Supp. at 1251 (quoting *Henderson v. Henderson,* 3 Hare 100, 114-115 (Newfoundland 1843)).[4]

The Canadian courts have consistently followed this doctrine. For example, in *Leutner v. Garbuz,* 1 W.W.R. 436 (Alberta 1970), the court held: "[I]f in any Court of competent jurisdiction a decision is reached, a party is estopped from questioning it in a new legal proceeding. But the principle also extends to any point, whether of assumption or admission, which was in the substance the ratio of and fundamental to the decision." 1 W.W.R. at 442 (quoted in *Bank of Montreal v. Kough, supra,* 430

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[3] The holding in *Cleland* is based on former Code of Civil Procedure Section 1915, which provided that "a final judgment of any … tribunal of a foreign country having jurisdiction, according to the laws of that country, to pronounce the judgment, shall have the same effect as in the country where rendered, and also the same effect as final judgments rendered in this state." (119 Cal.App.2d at 20.) Section 1915 was repealed in 1974, but *Cleland* nevertheless still appears to be good law. *Bank of Montreal v. Kough, supra,* 430 F.Supp. at 1251.

[4] Copies of the Canadian court cases cited herein are attached hereto as Exhibit 3 for the Court's convenience.

F.Supp. at 1251-1252). And in *Girardot v. Welton,* 19 O.P.R. 162 (1900), the Ontario court held that "[t]he counterclaim of a defendant properly so-called is a claim by the defendant for relief which cannot be obtained by him in the action which is brought against him, and in order to obtain which he must resort to a cross or independent action, and such cross or independent action, when set up by him to the action brought against him, is a counterclaim properly so called; but, if the defendant's claim for relief is obtainable in the action brought against him, it is not a counterclaim properly so-called, and is not properly pleadable as such." 19 O.P.R 162 (quoted in *Bank of Montreal v. Kough, supra,* 430 F.Supp. at 1252-1253).

The *Bank of Montreal v. Kough* court cited the *Girardot* case for the purpose of demonstrating, under Canadian law, that the claims that could have been brought in an action, that were not "properly pleadable" as cross-claims or counterclaims, would be subject to the res judicata effect of a prior judgment. In that case, the court dealt with a default money judgment entered in British Columbia, and determined, first, that the judgment was recognizable in the California courts under the Uniform Foreign Money-Judgments Recognition Act, 430 F.Supp. at 1246-1251, and then held that, under Canadian law, that the purported cross-claims of the Defendant were not cross-claims at all, but were defenses that were silenced by the res judicata effect of the British Columbia judgment. 430 F.Supp. at 1251-1254.[5]

The same preclusive effect should be given to the Quebec Judgment in this case. As detailed above, the Quebec Action and the subsequent judgment were based on the

[5] This result is consistent with California law. In the California courts, a prior default judgment may have collateral estoppel effect. *See, e.g., English v. English,* 9 Cal.2d 358, 363-364 (1937). And in a subsequent proceeding between the parties on a different cause of action, a default judgment conclusively established the truth of all material allegations contained in the complaint in the first action, and every fact necessary to uphold the default judgment. *Four Star Electric, Inc. v. F&H Construction,* 7 Cal.App.4$^{th}$ 1375, 1380 (1992).

central nucleus of facts surrounding the commercial relationship between Mitec and Plaintiff.

And the central claims alleged by Plaintiff in this action are in fact defenses to its obligation to pay money to Mitec for the telecommunications equipment it purchased. This most obviously is the case with respect to the claims for breach of contract and breach of the implied covenant of good faith and fair dealing, which deal directly with claims on the Bill and Hold Agreement. But it also is the case with respect to the claims for misappropriation of trade secrets; fraud and deceit; and interference with prospective economic advantage; each of these claims is set forth to offset or prevent Mitec from recovering the money due it under the Bill and Hold Agreement. As such, these claims are all in the nature of defenses, and thus are precluded by the Quebec Judgment.

## IV. CONCLUSION

For the foregoing reasons, Mitec respectfully requests that the Court grant its motion to dismiss Plaintiff's Second Amended Complaint, or alternatively its motion for summary judgment, on grounds of the res judicata effect of the Quebec Judgment.

Dated: September 5, 2008

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